IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1473

NADEAN O. McARTHUR,
Petitioner,

versus

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
in and for Okeechobee County,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner, Nadean O. McArthur, respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of Florida entered in this case on March 31, 1978. That final order denied a suggestion for writ of prohibition seeking to prevent respondent Circuit Judge from proceeding to retry petitioner on an indictment charging murder in the first degree, after a prior conviction for that offense had been reversed by the Supreme Court of Florida on the sole ground that the evidence had been legally insufficient to support the conviction.

The question presented by this petition for writ of certiorari is identical to that presented to this Court in *Greene* v. *Massey*, 546 F.2d 51 (5th Cir.), *cert. granted*, 432 U.S. 905 (1977) (No. 76-6617), which case was argued before this Court on November 28, 1977.

OPINIONS BELOW

The order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition is as yet unreported, but is reproduced as Appendix A hereto. The order of the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Okeechobee County, denying petitioner's motion to dismiss the indictment on the ground that a retrial would place petitioner twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution is likewise unreported, but is reproduced as Appendix B hereto. The opinion of the Supreme Court of Florida reversing petitioner's prior conviction for the offense of first degree murder is reported at 351 So.2d 972, and is reproduced as Appendix C hereto.

JURISDICTION

The order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition was entered on March 31, 1978. This Court has jurisdiction to review that order by writ of certiorari pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Whether, when the highest court of a state has previously reversed a conviction of first degree mur-

der on the sole ground that the evidence was legally insufficient to support the conviction after petitioner had unsuccessfully moved for a judgment of acquittal on that ground in the trial court, retrial of petitioner for the same offense is barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's husband, Charles M. McArthur, died on June 10, 1973, as a result of a gunshot wound. On August 30, 1973, petitioner was indicted by an Okeechobee County, Florida, Grand Jury. The indictment charged petitioner with the first degree murder of her husband.

Petitioner's trial on that indictment commenced on April 14, 1975. At the conclusion of the State's case, petitioner moved for entry of a judgment of acquittal on the ground that the evidence presented by the State failed to prove that the death of Charles M. McArthur was anything other than an accident, and that therefore the evidence was insufficient to prove the offense charged in the indictment beyond and to the exclusion of a reasonable doubt. This motion was denied by the trial judge.

At the conclusion of all the evidence, petitioner again moved for a judgment of acquittal, contending that the evidence was insufficient to support a conviction of the offense charged in that it failed to exclude at least three hypotheses concerning the manner of

Charles M. McArthur's death, all of which hypotheses were consistent with a finding that the discharge of the gun was accidental, and that, therefore, petitioner was innocent. The motion for judgment of acquittal was again denied by the trial judge.

The trial was concluded on April 23, 1975, when the jury returned a verdict of guilty of murder in the first degree. Petitioner then renewed her motion for judgment of acquittal, again contending that the evidence was insufficient to support a conviction of the offense charged in the indictment, or any lesser included offense, because the evidence failed to exclude several reasonable hypotheses, all of which were consistent with the conclusion that the death of Charles M. McArthur had been accidental. In an order denying petitioner's renewed motion for judgment of acquittal, the trial judge concluded that the evidence had been legally sufficient to support the verdict.

On May 9, 1975, the trial judge adjudged petitioner guilty of the offense of murder in the first degree as charged in the indictment, and sentenced her to life imprisonment, with a provision that she be required to serve no less than 25 years before becoming eligible for parole.

Petitioner appealed the conviction, contending in her first three assignments of error that the trial judge's repeated denials of her motion for judgment of acquittal had been erroneous. The principal point argued to the Supreme Court of Florida on that appeal was that the evidence relied upon by the State to prove petitioner's guilt had been entirely circumstantial,

and was insufficient to exclude every reasonable hypothesis of innocence, so that the trial judge erred in denying petitioner's repeated motion for a judgment of acquittal. The relief requested by petitioner was reversal of the conviction and a remand with directions that petitioner be discharged.

On September 30, 1977, the Supreme Court of Florida rendered its opinion reversing the conviction on the sole ground that the evidence was legally insufficient to support that conviction. *McArthur* v. *State*, 351 So.2d 972 (Fla.1977) (A. 3).* In the course of its opinion, the Supreme Court of Florida found that the evidence presented at petitioner's trial was not inconsistent with all reasonable hypotheses of innocence (351 So.2d at 976; A. 11); that the evidence was not inconsistent with the conclusion that the death of petitioner's husband had been accidental (351 So.2d at 978; A. 14); that petitioner's "innocence ha[d] not been disproved" (351 So.2d at 978; A. 15); and that "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). However, the opinion concluded by directing that petitioner, "if the state so elects, be afforded a new trial." (351 So.2d at 978; A. 15.)

The State filed a petition for rehearing, claiming that the evidence had been legally sufficient to justify petitioner's conviction; that the homicide could not have been an accident; and that petitioner had failed to show that any reasonable hypothesis of innocence existed. The petition for rehearing was denied by the Supreme Court of Florida without opinion on

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* Hereinafter, (A. ____) shall refer to the appendices hereto.

December 6, 1977. On the same day, the Supreme Court of Florida issued its mandate to the circuit court, directing "that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida."

On December 20, 1977, the State filed a "Motion to Set Cause for Trial," thereby evincing its intent to retry petitioner on the charge of first degree murder made in the indictment returned on August 30, 1973. This was the same charge on which petitioner was previously tried and convicted, and the same charge which the Supreme Court of Florida concluded the State had failed, as a matter of law, to prove.

On January 4, 1978, petitioner filed in the circuit court a motion to dismiss, contending that compelling her to again stand trial on the charge of first degree murder would violate her right, under the Fifth and Fourteenth Amendments to the United States Constitution, not to be twice put in jeopardy for the same offense (Motion to Dismiss, at 1).

In an order dated January 20, 1978, and filed on January 23, 1978, the respondent Circuit Judge denied petitioner's motion to dismiss and granted the State's motion to set the cause for trial, directing that retrial of the cause shall commence on July 10, 1978 (A. 2).

On February 23, 1978, petitioner filed in the Supreme Court of Florida a suggestion for writ of prohibition, asking that court to grant a writ of prohibition directed to respondent Circuit Judge, prohibiting respondent Circuit Judge from attempting to exercise

any further jurisdiction over petitioner based upon the indictment returned on August 30, 1973. The suggestion for writ of prohibition stated that:

> "Respondent Circuit Judge is without jurisdiction to proceed further in the cause because, this Court having concluded that the evidence offered by the State at petitioner's previous trial was legally insufficient to justify her conviction, a retrial of petitioner on the same indictment for which she was previously tried would deprive petitioner of her right, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution, not to be twice placed in jeopardy for the same offense." (Suggestion for Writ of Prohibition, at 4.)

The Supreme Court of Florida denied petitioner's application for oral argument on her suggestion for writ of prohibition, and, without requiring any response to be filed by either the State or respondent Circuit Judge, on March 31, 1978, entered a one line order stating that: "Upon consideration of the Suggestion for Writ of Prohibition, it is ordered by the Court that said suggestion be and the same is hereby denied" (A. 1).

REASONS FOR GRANTING THE WRIT

Retrial of petitioner on the charge of first degree murder, after a successful appeal in which the Florida Supreme Court found that the evidence was legally insufficient to support the conviction, will deprive petitioner of her right under the Fifth and Fourteenth Amendments to the United States Constitution not to be placed twice in jeopardy for the same offense.

The instant petition presents the same question for review by this Court as does *Greene* v. *Massey*, 546 F.2d 51 (5th Cir.), *cert. granted*, 432 U.S. 905 (1977) (No. 76-6617), which case was argued before this Court on November 28, 1977. However, petitioner submits that the instant petition should be granted because the facts presented by this petition portray much more graphically than do the facts in the *Greene* case the fundamental unfairness of allowing a retrial on a charge which an appellate court has previously concluded the State failed, as a matter of law, to prove at the previous trial.

In the instant case, petitioner was indicted by an Okeechobee County, Florida, Grand Jury, which charged her with the first degree murder of her husband. She was tried and convicted of that offense, despite the fact that during and after the trial she repeatedly moved the trial judge to enter a judgment of acquittal, contending that the circumstantial evidence presented by the State was legally insufficient to prove her guilt beyond a reasonable doubt; that the evidence failed to show that the death of her husband could not have been accidental; and that the evidence failed to exclude several reasonable hypotheses, all of which were consistent with her innocence. All of these motions were denied by the trial judge.

On appeal of petitioner's conviction, the Supreme Court of Florida concluded that the evidence was not inconsistent with petitioner's innocence (351 So.2d at 976; A. 11); "that the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death" (351 So.2d at 978; A. 14); that petitioner's "innocence ha[d] not been disproved" (351 So.2d at 978; A. 15); and that "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). These findings are susceptible to but one conclusion — the trial judge should have granted petitioner's repeated motion for judgment of acquittal, made during the trial. Yet, when petitioner sought to prevent a second trial on the ground that such a trial would deprive her of her right under the Fifth and Fourteenth Amendments to the United States Constitution not to be twice placed in jeopardy for the same offense, her motion was perfunctorily denied by respondent Circuit Judge. And when she attempted to invoke the assistance of the Supreme Court of Florida by means of a suggestion for writ of prohibition, that court, without allowing oral argument or requiring any reply by the respondent, summarily denied petitioner's request with a one sentence order.

In *Bryan* v. *United States*, 338 U.S. 552 (1950), this Court dealt for the first and only time with the contention that a second trial after reversal of a conviction for the same offense by an appellate court on the ground that the evidence was legally insufficient to justify that conviction deprived a defendant of his rights under the Fifth Amendment to the United States Constitution, which provides, in its relevant part, that

"[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."*

In a somewhat cryptic opinion, this Court dealt with what appeared to be a well-founded claim in one paragraph, saying merely that:

> "Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. '* * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' Francis v. Resweber, 329 U.S. 459, 462, 67 S.Ct. 374, 375, 91 L.Ed. 422. See Trono v. United States, 199 U.S. 521, 533-534, 26 S.Ct. 121, 124, 50 L.Ed. 292, 4 Ann.Cas 773." 338 U.S. at 560.

Admittedly, the *Bryan* decision would appear at first glance to lend support to the decisions of the courts below. However, if one examines the cases relied upon for the conclusion reached in *Bryan*, it soon becomes apparent that the conclusion rests upon an unsound foundation. In the first place, the quotation from *Francis* v. *Resweber* (329 U.S. at 462) is dictum. Furthermore, the authority cited to support that statement was *United States* v. *Ball*, 163 U.S. 662 (1895), a

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* In *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969), this Court concluded that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," which "should apply to the States through the Fourteenth Amendment."

case in which this Court concluded that there was no double jeopardy problem when the previous conviction had been reversed *for trial errors;* it had nothing to do with the propriety of a second trial after the previous conviction had been reversed because of insufficient evidence. Finally, it should be noted that *Trono* v. *United States,* 199 U.S. 521 (1905), the other case cited as authority by this Court in the *Bryan* decision, has since been severely limited, if not overruled completely, by this Court's decision in *Green* v. *United States,* 355 U.S. 184 (1957).

Green and other decisions of this Court subsequent to *Bryan* have eroded, if not discarded altogether, the waiver theory used in *Bryan* to justify the conclusion that a second trial after appellate reversal for insufficient evidence does not constitute double jeopardy. *See Breed* v. *Jones,* 421 U.S. 519 (1975); *United States* v. *Wilson,* 420 U.S. 332 (1975); *United States* v. *Tateo,* 377 U.S. 463 (1964); *Sapir* v. *United States,* 348 U.S. 373 (1955). Thus, in *Green, supra,* this Court dealt with the waiver theory in general as follows:

> "[T]he Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. . . . When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." 355 U.S. at 191-92.

Several lower federal courts have expressed their disagreement with the rule promulgated in *Bryan* and the frustrations they have in attempting to apply such a rule:

> "Unlike reversals due to procedural errors of law that impair effective presentation of the defendant's case, reversals based on the failure of the prosecution's proof represent the judgment of an appellate court that the defendant was entitled to a directed acquittal at trial. By subjecting defendants who win such appellate reversals to retrial, *Bryan* serves to heighten rather than mollify disparities inherent in our criminal justice system, for, had the defendants been before other trial judges, they may well have received the directed acquittals to which they were entitled — acquittals from which the prosecution would have no appeal. . . . By permitting defendants similarly situated with respect to their right to a directed acquittal to be treated differently, *Bryan* works to undermine rather than promote the fair and impartial administration of criminal justice." *Sumpter* v. *DeGroote,* 552 F.2d 1206, 1211-12 (7th Cir. 1977).

Similar frustration has been expressed by the District of Columbia Circuit in *United States* v. *Wiley*, 517 F.2d 1212 (D.C.Cir.1975). And the Third Circuit has said, completely disregarding *Bryan*, that "[r]eversals or mistrials granted on the basis of insufficient evidence or any other assessment of the facts presented at trial . . . bar reprosecution." *United States* v. *DiSilvio*, 520 F.2d 247, 249 n.3 (3rd Cir.), *cert. denied*, 423 U.S. 1015 (1975).

The findings made by the Supreme Court of Florida on petitioner's direct appeal of her conviction are susceptible to but one conclusion — the trial judge should have granted petitioner's repeated motion for judgment of acquittal, made during the trial. It is clear that, had the trial judge properly followed the law and granted petitioner's motion for judgment of acquittal, the State could not force her again to stand trial on the charge of first degree murder made in the indictment, even if it were subsequently found that the judgment of acquittal had been improperly granted. *See generally United States* v. *Martin Linen Supply Company*, 430 U.S. 564 (1977); *Fong Foo* v. *United States*, 369 U.S. 141 (1962).

The Fifth Amendment to the United States Constitution provides, in its relevant part, that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This Court has said, concerning that provision, that:

> "The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby

> subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.' *Green* v. *United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); see also *Downum* v. *United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034, 10 L.Ed.2d 100 (1963). '[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.' *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (Harlan, J.)." *United States* v. *Martin Linen Supply Company*, 430 U.S. 564, 569 (1977).

Assuming this statement of purpose to be of continuing vitality, there is no logical basis whatsoever for concluding that, while a defendant who has been successful in obtaining a judgment of acquittal upon motion made to the trial judge may not be tried again for the same offense, a defendant whose motion for judgment of acquittal was erroneously denied by the trial judge but who was successful in obtaining reversal on appeal solely because the evidence was legally insufficient to justify the conviction, may be tried again. As one court has said:

> "We can see no essential difference — except one of unfairness — between a defendant who

> is acquitted at trial and one who has to appeal to obtain reversal of a conviction on the ground of insufficient evidence. Surely, it would compound the unfairness to require that the latter also submit to a retrial." *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653, 659 n.2 (Ct.App.1968).

In this regard, a growing vanguard of state appellate courts has concluded that retrial of a defendant whose conviction has been reversed on the ground that the evidence offered at the previous trial was insufficient to justify the conviction is prohibited by principles of double jeopardy. *See, e.g., State* v. *Torres*, 109 Ariz. 421, 510 P.2d 737 (1973); *People* v. *Rutt*, 179 Colo. 180, 500 P.2d 362 (1972); *Hervey* v. *People*, 178 Colo. 38, 495 P.2d 204 (1972); *People* v. *Woodall*, 61 Ill.2d 60, 329 N.E.2d 203 (1975); *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653 (Ct.App.1968); *People* v. *Banks*, 37 Mich.App. 280, 194 N.W.2d 488 (Ct.App.1971); *State* v. *Moreno*, 69 N.M.113, 364 P.2d 594 (1961); *State* v. *Alston*, 26 N.C.App. 418, 216 S.E.2d 416 (Ct.App.1975).

In *State* v. *Moreno, supra*, the Supreme Court of New Mexico, reviewing a conviction for possession of marijuana with intent to unlawfully sell and deliver it, examined the record and found it to be devoid of evidence to support the conviction. The court reversed and remanded with instructions to discharge the defendant, saying:

> "The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged." 364 P.2d at 595.

In *People* v. *Brown, supra*, a case containing an excellent discussion of the question, the court dealt with the argument, sometimes raised, that when a defendant moves for a new trial as well as for a judgment of acquittal, he waives his right to stand behind the double jeopardy clause, even though the appellate court finds that the evidence was legally insufficient, and a new trial may be awarded. The court said:

> "We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative." 241 N.E.2d at 662.

Commentators addressing this subject have overwhelmingly questioned the fundamental fairness of decisions which conclude that compelling a defendant to stand trial a second time after his prior conviction

was reversed on appeal for insufficient evidence does not place him twice in jeopardy for the same offense. The two leading authorities on federal practice have called such decisions "illogical" and "fundamentally inconsistent with the Double Jeopardy clause." *See* 8A J. Moore, Federal Practice ¶ 29.09[2] (1977 ed.); 2 C. Wright, Federal Practice and Procedure (Criminal) §470 (1969 ed.).

One author has noted a recent trend toward application of the double jeopardy clause to prohibit retrial after reversal by an appellate court for insufficient evidence. *See* C. Thompson, "Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal," 8 Ind.L.Rev. 497 (1975). The author concludes that:

"The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence? By reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of

justice that the defendant was not acquitted at trial." *Id.* at 501-02.

If it is permissible for the State to try petitioner a second time for the same offense, at what point is it no longer permissible for the State to retry petitioner? Suppose that petitioner is again convicted, again appeals, and the evidence is again found legally insufficient. May the State try her again? This is precisely why the prohibition upon placing an individual twice in jeopardy for the same offense was included in the Bill of Rights. Without such a safeguard, the State must, because of the vast resources it possesses, sooner or later emerge successful in breaking, if not convicting, the defendant in a criminal prosecution of this type.

Fundamental concepts of justice dictate that the State should be given only one fair opportunity to introduce evidence sufficient to convict an individual whom it charges with a crime. To the extent that the decision of this Court in *Bryan* v. *United States, supra*, suggests a contrary result, that decision is illogical, arbitrary and fundamentally unfair, and should be overruled. The State has had one fair opportunity to present evidence sufficient to justify petitioner's conviction, and has failed. It should not be permitted to try petitioner again.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF FLORIDA

FRIDAY, MARCH 31, 1978

NADEAN O. McARTHUR,
Petitioner,

versus Case No. 53,465

PHILIP G. NOURSE, Circuit Judge, etc.,
Respondent.

Upon consideration of the Suggestion for Writ of Prohibition, it is ordered by the Court that said suggestion be and the same is hereby denied.

OVERTON, C. J., SUNDBERG, HATCHETT and KARL, JJ., concur
ENGLAND, J., dissents

APPENDIX B

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
OKEECHOBEE COUNTY

STATE OF FLORIDA

versus Case No. 73-74-CF

NADEAN O. McARTHUR,
Defendant.

ORDER

The Court has before it the motion to set cause for trial filed by the State on December 20, 1977, and the motion to dismiss the indictment on the ground of double jeopardy filed by the defendant on January 4, 1978. The Court having considered these motions, and having heard argument of counsel thereon, it is

ORDERED that:

1. The motion to dismiss the indictment on the ground that a retrial of defendant would place her twice in jeopardy for the same offense in violation of the United States and Florida Constitutions, filed by defendant on January 4, 1978, is denied.

2. The motion to set cause for trial, filed by the State on December 20, 1977, is granted, and retrial of this case shall commence on July 10, 1978.

3. This order is without prejudice to the right of either the State or defendant to seek a change of venue.

DONE AND ORDERED in Chambers, at Ft. Pierce, St. Lucie County, Florida, this 20th day of January, 1978.

/s/ Philip G. Nourse
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JULY TERM, 1977

NADEAN O. McARTHUR,
Appellant,

versus Case No. 49,526
Circuit Court
Case No. 73-74-CF

STATE OF FLORIDA,
Appellee.

Opinion filed September 30, 1977

An Appeal from the Circuit Court in and for Okeechobee County, James E. Alderman, Judge

Chester Bedell, Jacksonville; Eugene P. Spellman, Miami; and Raymond E. Ford, Fort Pierce, for Appellant

Robert L. Shevin, Attorney General, Tallahassee; Harry M. Hipler, and Basil S. Diamond, Assistant Attorney Generals, West Palm Beach, for Appellee

ENGLAND, J.

By direct appeal we have before us for review the 1975 conviction of Nadean McArthur for the first degree murder of her husband, Charles McArthur. We have jurisdiction because the trial court upheld the validity of two statutes, Sections 40.01(1) and 775.082(1), Florida Statutes (1975).[1]

Appellant argues that, in addition to the two constitutionally infirm statutes, reversal of her conviction is required by six errors which occurred during her trial. After careful examination of the record, we find that five of these contentions require neither reversal nor extensive discussion.[2] Appellant's

1 Appeal was first taken to the Fourth District Court of Appeal, but pursuant to Fla.App.Rule 2.1(a)(5)(d) that court on its own motion transferred the appeal here.

2 First, the exclusion of lay opinion regarding appellant's emotional state immediately after her husband's death, though technically error, was not so prejudicial as to require reversal in light of other testimony which was adduced as to her conduct and statements. Second, the requested jury instruction on circumstantial evidence was generally repetitive of an instruction which was given, and though it would not have been error to give the instruction to the jury by the same token its rejection was not an abuse of the trial court's discretion. Third, the pretrial publicity which attended appellant's trial did not make it impossible to select an impartial jury as a matter of law or fact. Murphy v. Florida, 421 U.S. 794 (1975); Dobbert v. State, 328 So.2d 433 (Fla. 1976), *aff'd*, 45 U.S.L.W. 4721 (June 17, 1977).

Fourth, the limitations placed on defense counsel's voir dire examination of prospective jurors were carefully drawn to avoid tainting the jury panel with the substance of rumors which some

constitutional challenges require more detailed analysis, but similarly do not warrant reversal.

Appellant's challenge to the jury selection statute, Section 40.01(1), Florida Statutes (1975), essentially asks that we reconsider *Wilson v. State*, 330 So.2d 457 (Fla.1976), in which we sustained this statute, in light of the United States Supreme Court's decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975). That case held unconstitutional a Louisiana jury selection statute which operated to exclude women from jury service, since they were exempt unless requesting to serve, on the ground that the statute deprived defendants of their right to a jury selected "from a fair cross section of the community".[3] At the time of trial the Florida statute provided in relevant part that

> "expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty."[4]

The record fairly depicts the operation of the statute. Several mothers with children under the age of 18

prospective jurors might have heard. *Accord*, Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977). In fact, the record quite clearly shows that the jurors were not preconditioned to find for or against appellant, and that they were able to reach their conclusions solely on the basis of the evidence presented at trial. Finally, the trial judge did not abuse his discretion by refusing to sequester the jury. Fla.R.Crim.P. 3.370(a). On the contrary, he made a careful and determined inquiry into the need for sequestration and found that the fears of defense counsel, and his own preliminary concerns, were without basis in fact.

3 Taylor v. Louisiana, 419 U.S. at 530 (1975).

4 The 1975 Legislature lowered the statutory age from 18 to 15. Ch. 75-78, Laws of Florida.

were excused from jury service on the representation that hardship would be suffered if they could not be at home to care for their children. Some mothers were excused under the statute simply "upon their request", even though they held jobs outside the home and made no plea of hardship. One father asked to be excused because of the hardship to his seven motherless children if he could not earn his $110 weekly income. His request was denied by the court; however, counsel for both sides later requested that he be excused and the trial judge acceded. No expectant mothers were present to request exemption from jury duty.[5]

Since mothers with children under 18 were exonerated from jury duty simply on request, our concern is whether their absence denied defendants the opportunity to select a jury from a fair cross section of the community. We think not. The sixth amendment to the United States Constitution requires that no "large, distinctive groups are excluded from the [jury] pool".[6] This standard establishes two tests, and although the excluded group here appears sufficiently large to pass the "size of group" test, it fails what may be called the "nature of the group" test.

To evoke constitutional concern, the group excluded must be sufficiently "distinctive" to eliminate "the

5 No suggestion is made in this case that the state lacks a justification for providing expectant mothers with an exemption. In *Taylor*, the Supreme Court said:

> "The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." 419 U.S. at 534.

See also Kahn v. Shevin, 416 U.S. 351 (1974).

6 Taylor v. Louisiana, 419 U.S. at 530.

subtle interplay of influence" or the "distinct quality [which] is lost if either sex is excluded" totally.[7] Mothers of young children are not, we believe, so distinctive a class as to evoke sixth amendment concerns. Those eligible for jury service include mothers of older children, women without children, and fathers with children of all ages. No distinctive quality of parenthood or sex is lost by the exclusion of mothers who presently have children under 18.[8] Thus, while the legislative exclusion does not require hardship and may therefore operate automatically to exempt from jury service mothers who have no more compelling need to tend young children than fathers or the parents of older children, the class excluded is not constitutionally significant.

Appellant's second constitutional challenge asserts the invalidity of Section 775.082(1), Florida Statutes (1975), which requires a person convicted of a capital felony and sentenced to life imprisonment "to serve no less than 25 years before becoming eligible for parole . . . ." We have already upheld this statute against an assertion that it is an impermissible legislative

7 Ballard v. United States, 329 U.S. 187, 193-94 (1946), cited with approval in Taylor v. Louisiana, 319 U.S. at 531-532.

8 Although mothers of young children in contemporary society may have different attitudes or experiences than mothers of older children, our concern is a constitutional imperative. That there is an arguable sociological distinction of importance is a matter for the Legislature to consider.

> "The fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community."

Taylor v. Louisiana, 419 U.S. at 537-38.

usurpation of executive branch powers.[9] Appellant here contends that the statute imposes a cruel and unusual punishment, since it operates without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted. The state argues that the severity of the penalty is commensurate with the severity of the crime.

This very issue was recently addressed by the Second District Court of Appeal in *Quick v. State*, 342 So.2d 850 (Fla.2d DCA), aff'd per curiam, No. 51,246 (Fla.Sept. 29, 1977), in which a majority of the court upheld the statute. Judge McNulty filed a forceful dissent analogizing the situation to *Woodson v. North Carolina*, ___ U.S. ___, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), where the United States Supreme Court ruled that a mandatory death penalty for first degree murder is cruel and unusual punishment. We believe the *Quick* majority was correct, for in *Woodson* the Court recognized that term sentencing minima are significantly different from death sentences as regards federal constitutional criteria. The Court said:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy *rather than a constitutional imperative*, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular

9 Owens v. State, 316 So.2d 537 (Fla.1975); Dorminey v. State, 314 So.2d 134 (Fla.1975).

> offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."[10] (emphasis supplied.)

Relevant to the same concerns under Florida's Constitution is *O'Donnell v. State*, 326 So.2d 4 (Fla.1975), in which we upheld a statute imposing a mandatory minimum sentence of 30 years imprisonment for kidnapping.[11] In *O'Donnell* we reaffirmed the time-honored principle that any sentence imposed within statutory limits will not violate Article I, Section 8 of the Florida Constitution, and the reasoning used there is persuasive here. The correlation in seriousness and potential deterrent value between a minimum 30 year sentence and the crime of kidnapping is similar to the correlation between the minimum mandatory sentence imposed by Section 775.082(1) and the palpably more serious crime of premeditated murder. All this, of course, was at the heart of *Banks v. State*, 342 So.2d 469 (Fla. 1976), in which we rejected the very contention which appellant now raises. We held in *Banks* that this statute did not impose constitutionally proscribed cruel and unusual punishment, and we now reiterate that view.

10 Woodson v. North Carolina, ___ U.S. ___, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944, 961 (1976).

11 § 775.082(4)(a), Fla.Stat. (1973).

We come to appellant's last and principal contention before us, that as a matter of law there was insufficient evidence of her guilt to support her conviction. Appellant and the state agree as to the legal standard to be applied in cases where a conviction is based on circumstantial evidence,[12] as here, but they sharply disagree as to the application of that standard to the record in this case.

A review of prior decisions of this Court in similar cases[13] is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique. Moreover, while we have examined all of the evidence in the record before us, we can see no jurisprudential value in a lengthy

12 Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629 (Fla.1956); Mayo v. State, 71 So.2d 899 (Fla.1954); Head v. State, 62 So.2d 41 (Fla.1952). (The meaning of "not inconsistent" may be sufficiently different from "consistent" as to prevent a substitution of terms.) In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, above; Holton v. State, 87 Fla. 65, 99 So. 244 (1924).

13 This case is not similar to those in which a particular circumstance is consistent only with one conclusion. In Davis v. State, n. 12 above, for example, the state's own witness in a murder trial placed the time of the victim's death at a time when the accused was assisting law enforcement officers in a search for the victim. In Dewey v. State, 135 Fla. 443, 186 So. 224 (1938), the accused's pretrial story that his wife's death was caused by a single self-inflicted gunshot was totally discredited by proof that two shots had been fired. Nor is this case in any way similar to those in which the only hypothesis of innocence is wholly incredible. In Kersey v. State, 73 Fla. 832, 74 So. 983 (1917), for example, the only hypothesis of innocence was a suicide so bizarre in contrivance as to be inherently unbelievable.

recitation of that evidence in this opinion. A lengthy summary will suffice.

In general, the jury received two categories of circumstantial evidence — scientific and non-scientific. Our study of both types leads us to conclude that, on balance, neither is inconsistent with innocence.[14]

The non-scientific evidence in the record, consisting of witness testimony from the funeral home owner, ambulance drivers, police officials, and a local merchant,[15] is reasonably consistent with the version of events which appellant conveyed to investigating officers when they first arrived at the scene of her husband's death. She had told the officers that her husband had been concerned about her and their child's

14 Minor inconsistencies between appellant's statements and acts at the scene of the death and the proof relied upon by the state to evidence appellant's guilt create ambiguities in the tenor of proof, at best. Two examples will indicate the nature of these inconsistencies. Evidence was adduced regarding appellant's emotional state following the shooting. That evidence is consistent both with the state's theory that she was a calm murderess, calculating how to conceal her guilt, and with the defense's theory that she was in a state of shock. The state also presented evidence that appellant did not wait on her front doorstep for the ambulance to arrive and that she made coffee for the ambulance driver when he requested it. Both alone and with other facts, however, the damning effect of this evidence can be classed as ambiguous, if not explainable. The state, of course, draws from these bare facts a behavioral sketch of calm calculation, consistent with cold-blooded murder. The defense would explain them as being a product of shock. The defense also contradicted the adverse implication of the coffee facts by the testimony of the operator of the ambulance service who received Mrs. McArthur's call for assistance. The operator testified she had told appellant not to go into the bedroom where her husband's body lay, but rather "to go out to the kitchen and be busy making coffee, do something and our attendant would be there in a few minutes."

15 Appellant herself did not testify at the trial.

safety during his many absences, and that he had asked her to take out and check a gun which had been purchased two years before, in order to be sure she could handle it. While her husband lay in bed on his left side, she sat with the gun indian-style on the bed facing him, half on a pillow and half off. She told the officers that she had forgotten how the gun functioned and was fumbling with it, apparently while it was still inside a cloth bag. Her husband became impatient, grabbed for the gun, it went off, and he was shot in the head.

Appellant related the same outline of events to each other person who inquired as to what had occurred, except to one officer who stated that he was told the "gun fell, hit her knee, and went off". Although this officer was present at the scene of death with others who received a different explanation, no inquiry was made as to the conflict in statements, and the one officer's recitation is the only conflicting explanation in the record. Another witness to the same conversation in fact had no recollection of this statement by appellant.

All attempts by the state and by the defense to elicit from witnesses more details of appellant's statements at the time of death were unsuccessful. Based on the non-scientific conflicting evidence, we cannot accept the state's view that all reasonable hypotheses of innocence are incompatible with the record.

Both sides introduced fairly complex scientific evidence to explain or defeat appellant's hypothesis of an accidental shooting. Experts testified that it would have been possible for the gun to fire accidentally if

Mr. McArthur had grabbed for the gun and any one of three alternative acts had occurred: (1) he had hit the trigger while the hammer was in a full-cocked position, (2) he had caused the hammer to be released while the gun was held partially cocked by appellant, or (3) he had hit against the hammer, pushed it to a partially cocked position and then it automatically fell back. The gun also might have fired accidentally if it had been held upside down in the bag with portions of the cloth wrapped around the hammer or trigger in a particular manner, and if Mr. McArthur had grabbed and pulled the bag. There is no evidence that the gun had been or had not been in the full-cocked position when appellant was fumbling with it.

The gun was fired at a distance of about seven inches from Mr. McArthur, which is consistent with appellant's theory that Mr. McArthur leaned forward to grab for the gun. The presence of smudge marks (cylinder flare) on the underside of one pillow shows that the gun was fired when very close to the pillow, another fact consistent with appellant's contention that she was sitting partially on the pillow, thereby causing the other half to rise slightly. (The location of these marks, we recognize, is also consistent with the state's suggestion that she was holding the gun close to the pillow when she intentionally murdered her husband.[16]) The presence of barium and antimony on

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16 The prosecution took conflicting positions on this point before the trial court and jury. In closing argument the prosecution theorized that appellant held the pillow over the gun when she murdered her husband in order to muffle the sound, but when the defense attempted to elicit expert testimony that the pillow could not have been wrapped over the gun without causing "double" cylinder flare marks, the state conceded to the trial judge that the first theory was untenable. As a consequence the expert was allowed to testify that the pillow could not have been held over the gun.

Mr. McArthur's hands is consistent both with the gun having been fired intentionally while his hands were raised in a defensive posture, as the state suggests, and with the gun having fired accidentally when one of Mr. McArthur's hands hit the hammer as he braced his weight and leaned forward to grab the weapon.

The angle by which the bullet entered Mr. McArthur's head, and the pattern of blood on the wall, are consistent both with his leaning forward to grab the weapon and appellant's having shot him while his head was raised at least one foot off the bed. Similarly, the pattern of blood on the pillow was consistent with appellant's version of the pillow's placement where she was sitting.[17]

From the totality of scientific and non-scientific evidence at appellant's trial, we are forced to conclude that the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death. The jury could reasonably have concluded, and obviously did conclude, that it was more likely that appellant murdered her husband than that she did not. Yet "even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence".[18] On this record appellant's innocence has not been disproved. Only she knows the truth, and it was and is her constitutional right not to offer her explanation, her demeanor, her candor and her credibility to the jury. The state simply did not carry its burden of proof. Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that appellant, if the state so elects, be afforded a new trial.

17 The evidence is uncontradicted that the pillow was moved at least once before police photographed the scene, so it became impossible to prove how the pillow was positioned at the time the gun was fired. However, the bloodstains and tissue on the pillow indicate that, at least very shortly after the shot, the pillow was positioned where appellant said it had been. The state argued to the jury that appellant moved the pillow to the place on the bed where it was found when the police photographed the scene. This suggested a theory itself inconsistent with her guilt because it assumed a murderess would rearrange physical evidence so that it would be inconsistent with her story. Obviously, no inference relevant to appellant's guilt can be drawn from the fact that the pillow may have been negligently moved by one of the police officers or one of the ambulance attendants.

It is so ordered.

OVERTON, C.J., HATCHETT and KARL, JJ., Concur
BOYD, J., Concurs in part and dissents in part with an opinion
ADKINS and SUNDBERG, JJ., Dissent

BOYD, J., Concurring in part and dissenting in part.

I concur in that part of the majority opinion quashing the murder conviction of appellant. If a new trial is to be held, the venue should be changed.

In *Griffis v. Hill*, 230 So.2d 143 (Fla. 1969), this Court held that whenever an appellate court concludes that a jury of reasonable people could not have reached the verdict under consideration without a mistake of law or fact, it is the duty of the court to quash the judgment. A careful review of all of the evidence in this case

18 Davis v. State, n. 12 above at 632.

leads me to conclude that the quantum of proof against appellant at the trial was inadequate to prove appellant's guilt beyond and to the exclusion of any reasonable doubt.

Although some jurisdictions permit a new trial of an accused person by the government when convictions are reversed due to insufficient evidence, it is my opinion that such action constitutes double jeopardy, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution. I therefore would dissent to that portion of the opinion requiring a new trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1473

NADEAN O. McARTHUR,

Petitioner,

vs.

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
In and For Okeechobee County,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OPINIONS BELOW

The order of the Supreme Court of Florida denying Petitioner's Suggestion for Writ of Prohibition (Pet. App. A)[1] is as yet unreported. The order of the Circuit

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

Court of the Nineteenth Judicial Circuit of Florida, In and For Okeechobee County, denying Petitioner's Motion to Dismiss the Indictment on double jeopardy grounds (Pet. App. B) is also unreported. The opinion of the Supreme Court of Florida reversing Petitioner's conviction and affording Petitioner a new trial is reported at 351 So. 2d 972 (Pet. App. C).

JURISDICTION

The order of the Supreme Court of Florida denying Petitioner's Suggestion for Writ of Prohibition was entered on March 31, 1978. The Petition for Writ of Certiorari was filed on or about April 13, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether, in the circumstances of this case, retrial of Petitioner is permitted

under the Double Jeopardy Clause where the Florida Supreme Court reversed her conviction for "insufficiency of the evidence" and remanded the cause to the Trial Court for a new trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ***(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb***.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ***(N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE INVOLVED

Florida Appellate Rule 6.16 (b) provides:

> Upon an appeal by the defendant from the judgment the Appellate Court

> shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the Appellate Court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

STATEMENT

On June 10, 1973, Petitioner's husband, Charles M. McArthur, was fatally wounded by a gunshot in the bedroom of his home. Petitioner was the only other person present in the bedroom at the time of the shooting. On August 30, 1973, she was indicted on charges of First Degree Murder by the Okeechobee County, Florida, Grand Jury.

Petitioner's trial commenced on April 14, 1975, before a jury. The State's case was based upon both scientific

and non-scientific evidence--including testimony regarding Petitioner's emotional state following the shooting and conflicting statements given by her at the scene--intended to demonstrate the falsity of Petitioner's contention that the shooting was accidental.[2]

After presenting its case, the State rested and Petitioner moved for a judgment of acquittal. The trial court denied the motion. The defense then presented its case and rested.[3] Once again Petitioner moved for a judgment of acquittal and again the motion was denied by the trial court.

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[2]A summary of the evidence as found by the Supreme Court of Florida in support of its holding is found in that Court's opinion at 351 So. 2d 972 (Pet. App. C). A detailed recitation of the evidence at trial is unnecessary to a determination of the issue before this Court.

[3]Petitioner did not testify in her own behalf. Her version of the shooting came out through testimony regarding her statements at the time of her husband's death.

Following closing arguments of counsel and the court's instructions, the case was submitted to the jury. On April 23, 1975, the jury returned a unanimous verdict of guilty of first degree murder.

Following the jury's verdict, Petitioner renewed her motion for a judgment of acquittal, which was again denied by the trial court which held that the evidence was sufficient to sustain the verdict.

On May 2, 1975, Petitioner filed a Motion for New Trial with the trial court (App. 1-8).[4] This motion set forth thirty-three (33) alleged grounds in support of Petitioner's request for a new trial. Of these thirty-three (33) grounds asserted, twelve (12) related to the alleged

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[4]"App." refers to the Appendix to this brief.

insufficiency of the evidence to support the verdict. Included among these twelve (12) sufficiency of the evidence allegations were Petitioner's contentions--asserted throughout this case and ultimately ruled upon in her favor by the Supreme Court of Florida--that the evidence presented by the State, being circumstantial in nature, was not sufficient to exclude every hypothesis of innocence, including Petitioner's explanation shortly after the shooting that her husband's death was accidental.

On May 9, 1975, the trial court entered an order and opinion denying Petitioner's Motion for New Trial (App. 9-15). In the course of that opinion the trial court stated (App. at p. 9):

> Grounds 2, 3, 13, 14, 15, 16, 17, 18, 20, 23, 26 and 27, all relate to an alleged insufficiency of the evidence

> in this case. The sufficiency of evidence has already been determined by the Court in its order denying the Defendant's Post Verdict Motion for Judgment of Acquittal.

Thereupon, the trial court adjudged Petitioner guilty of first degree murder and sentenced her to life imprisonment.

Petitioner appealed her conviction to the Supreme Court of Florida. On September 30, 1977, that Court rendered its opinion reversing Petitioner's conviction. McArthur v. State, 351 So. 2d 972 (Fla. 1977) (Pet. App. C). The Court's holding was based on its view of the evidence as being insufficient to exclude all reasonable hypotheses of innocence, including Petitioner's claim of accident. This holding sustained the precise arguments set forth by Petitioner, and rejected by the trial court, in the Motion for New Trial filed after the

verdict (App. 1-8). The Court concluded its opinion by holding (351 So. 2d at 978; Pet. App. C, at p. 15):

> Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that Appellant, if the state so elects, be afforded a new trial.

A petition for rehearing filed by the State was denied on December 6, 1977, and the Supreme Court of Florida issued its mandate directing further proceedings in the trial court.

On December 20, 1977, the State filed in the trial court a Motion to Set Cause for Trial. On January 4, 1978, Petitioner responded with a Motion to Dismiss alleging a double jeopardy bar to reprosecution. On January 20, 1978, the trial court entered an order denying Petitioner's Motion to Dismiss and granting the State's Motion to Set Cause for Trial,

scheduling the trial for July 10, 1978 (Pet. App. B).

On February 23, 1978, Petitioner filed a Suggestion for Writ of Prohibition in the Supreme Court of Florida seeking to prevent her reprosecution. The suggestion was denied on March 31, 1978 (Pet. App. A), and Petitioner now seeks review in this Court.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, bars her reprosecution in the case at bar due to the Florida Supreme Court's reversal of her conviction on sufficiency grounds. Respondent submits, however, that the Double Jeopardy Clause, as delineated by this and a myriad of other courts, both State and Federal, does not bar reprosecution of Petitioner in the

circumstances of this case and in the context of Florida appellate procedure. Nor, as a matter of constitutional interpretation and policy considerations, should that clause be interpreted as Petitioner suggests.

Respondent's constitutional and legal arguments concerning the issue presently before this Court, were generally briefed and argued to this Court in Greene v. Massey, 546 F. 2d 51 (5th Cir. 1977), cert. granted, 432 U.S. 905 (1977) (No. 76-6617, argued November 28, 1977).

As such, we deem it unnecessary to repeat verbatim our arguments in that case and, in the interest of judicial economy, we would refer this Court to respondent's arguments in Greene as advanced in respondent's Brief in Opposition to the Petition for Writ of Certiorari, respondent's Brief on the Merits and oral argument, as those arguments

apply to the circumstances of the present case.[5] Generally, our argument in Greene, and similarly in the present case takes into account several factors which support our view that the Double Jeopardy Clause is not a bar to reprosecution in Florida where an Appellate Court reverses a conviction for insufficient evidence and

[5]Greene v. Massey, supra, was before this Court in a different procedural posture than the instant case, to-wit, by way of federal habeas corpus. 28 U.S.C. 2254. As such, the issue was there briefed and argued as to whether federal habeas corpus review was available to a defendant to assert a violation of the Double Jeopardy Clause where that issue had been fully and fairly considered in the State Courts (see Respondent's Brief on the Merits, Argument A, pp. 9-21). Accordingly, depending upon this Court's resolution of the habeas corpus issue in Greene, it is conceivable that the double jeopardy issue presented therein may not even be reached by this Court. However, as will become apparent throughout the remainder of this brief, the double jeopardy arguments advanced by the respondent in Greene (Id. Argument B, pp. 22-40) are applicable in the present case and, as will be demonstrated, militate strongly against Petitioner's contentions herein.

remands the cause for a new trial.

First, in a long line of Federal and State cases, including this Court's decision in Bryan v. United States, 338 U.S. 552 (1950), it has become well established that the Double Jeopardy Clause does not bar reprosecution when an Appellate Court reverses a conviction on the basis of insufficiency of the evidence. These decisions are grounded not only upon the traditional view that when a defendant successfully attacks his conviction on appeal he foregoes any double jeopardy claims upon being retried, but also, in the Federal system, upon the broad discretion vested in the Appellate Courts by operation of 28 U.S.C. 2106 to enter those orders appropriate to the circumstances of individual cases. Similarly, in Florida, the appellate courts are vested with broad discretion, pursuant to

Florida Appellate Rule 6.16 (b),[6] to fashion remedies appropriate to the circumstances of each case in the "interests of justice."

Second, the aforementioned Florida Appellate Rule specifically contemplates the option of ordering a new trial where an appellate court deems it appropriate in the interests of justice after reviewing the sufficiency of the evidence.

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[6]This rule was in effect at all times relevant to the present case. On March 1, 1978, the Florida Appellate Rules were superseded by the new Florida Rules of Appellate Procedure. New Rule 9.140 (f) provides:

> Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

This rule has been viewed as justifying reversal of a conviction and the ordering of a new trial where, although the evidence may be legally and technically sufficient to support the jury's verdict, nonetheless, its weight is sufficiently weak to require a new trial in the interests of justice. For example, in Tibbs v. State, 337 So. 2d 788 (Fla. 1976), the Supreme Court of Florida, in reviewing a conviction for rape and murder, held (Id. at 791):

> We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legislature has directed that we review the "entire record"...
>
> Rather than risk the very real possibility that Tibbs has nothing to do with these crimes, we reverse his conviction and remand for a new trial.

See also Askew v. State, 118 So. 2d 219 (Fla. 1960); Lowe v. State, 19 So. 2d 106 (Fla. 1944).

Thus, it is readily apparent that a mechanism has been created in Florida whereby an appellate court, out of an abundance of caution, can reverse a conviction and order a new trial where, irregardless of the sufficiency of the evidence as a matter of pure law, the case is such that the interests of justice require a second trial. Dealing within this framework, it is once again submitted that the Double Jeopardy Clause is not a bar to reprosecution of Petitioner.

Third, it is quite clear that criminal defendants are often placed in the position of choosing between two or more courses of action, often equally undesirable to them, during the course of the criminal proceedings of which they are a part. However, once they have chosen the course of action to pursue, they cannot subsequently be heard to complain. For

example, in United States v. Dinitz, 424 U.S. 600 (1976), this Court held that even though the Defendant in that case was faced with what amounted to, at least from his perspective, a "Hobson's Choice", his motion for a mistrial, which was granted, precluded a subsequent claim of double jeopardy when the State sought to retry him. See also, Lee v. United States, ___ U.S. ___, 97 S. Ct. 2141 (1977). Similar considerations apply where, as in the present case, a defendant makes a motion for a new trial alleging insufficiency of the evidence and subsequently appeals the conviction on the same grounds.

The case at bar once again presents a strong argument against the position propounded by Petitioner. At the outset, it is interesting to note that in Petitioner's detailed and exhaustive recitation of the procedural history of this case, nowhere

is mention made of her Motion for New Trial of May 2, 1975 (App. 1-8). Respondent submits that this omission, whether inadvertent or intentional, is a significant indication of the weakness of Petitioner's argument when observed in the light of the anomalous result which would obtain from sustaining that argument. Had the trial court granted a new trial pursuant to one of the sufficiency of the evidence grounds asserted by Petitioner in her motion, could it seriously be argued that the Double Jeopardy Clause would have operated to bar the new trial, which was the specific relief prayed for? Such a contention could not logically be upheld. Cf. United States v. Dinitz, supra.

The trial court, of course, did not grant Petitioner's Motion for New Trial. The Supreme Court of Florida, however, did reverse the conviction and order a

new trial on grounds specifically asserted in the Motion for New Trial. Respondent submits that what the trial court could have done in this case without violating the Double Jeopardy Clause, the Supreme Court of Florida could certainly do as well.[7]

The spectre of endless retrials envisioned by Petitioner (Pet. 19) if her

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[7]It is apparent from the Supreme Court's order that it was of the view that the trial court had erred in not granting a new trial. Accordingly, the court reversed on the basis of that error and corrected it by granting the new trial which had previously been sought by Petitioner. Moreover, even in People v. Brown, 99 Ill. App. 2d 281, 241 N.E. 2d 653 (Ct. App. 1968), a case cited by Petitioner (Pet. 16-17), the Illinois appellate court stated:

> If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new trial request....

This is precisely what occurred in the case at bar.

arguments are not accepted by this Court, is an illusion. Petitioner has not demonstrated that such a situation has ever occurred in Florida. Moreover, defendants such as Petitioner are protected against the possibility of such vexatious litigation. The appellate courts of Florida retain the authority to discharge a defendant completely if the evidence is insufficient and the interests of justice would be served by a discharge. Florida Appellate Rule 6.16 (b).[8] And, should a defendant be the object of retrials attempted in bad faith, the traditional protections afforded by the Due Process and Equal Protection Clauses of the Fourteenth Amendment would remain available.

In summary, then, Petitioner's retrial for first degree murder will not violate

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[8] New Rule 9.140 (f) of the Florida Rules of Appellate Procedure, effective March 1, 1978.

the Double Jeopardy Clause given the appellate procedure in Florida which empowers the appellate courts to exercise, out of an abundance of caution, their discretion, to afford maximum protection to criminal defendants, particularly those charged with serious crimes. Moreover, in the case at bar, Petitioner has received the precise relief prayed for, and on the precise grounds asserted, in the trial court.

CONCLUSION

For the foregoing reasons, as well as the reasons and arguments advanced in respondent's briefs in this Court in Greene v. Massey, supra, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR
OKEECHOBEE COUNTY.

STATE OF FLORIDA,	
-vs-	CASE NO. 73-74-CF
NADEAN O. McARTHUR,	
Defendant.	

MOTION FOR NEW TRIAL

The Defendant, NADEAN O. McARTHUR, by and through her undersigned attorneys, moves the Court to grant her a new trial, in the above-styled cause, upon the following grounds:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the weight of the evidence.

3. That the evidence is insufficient to warrant or support a conviction of the Defendant of the offense charged in the indictment or any lesser included offenses of second degree murder, third degree murder or manslaughter.

4. That the evidence fails to show any motive whatsoever on the part of the Defendant to effect the death of her husband as alleged in the indictment.

5. That the Court erred in denying the motion of the Defendant for a change of venue.

6. That the Court erred in denying the motion of the Defendant for a change of venue in that it announced, prior to denial thereof and subsequent thereto, at the time of the selection of the jury, that it would deny counsel for the Defendant the opportunity to inquire of the individual prospective jurors,

out of the presence of the general venire and other prospective jurors, as to what had been discussed by and with them regarding the facts of the case, what they had read, heard or seen regarding the facts of the case prior to trial, and what opinion, if any, they had expressed or had expressed to them, regarding the guilt or innocence of the Defendant, in view of the fact that all of the prospective jurors questioned under oath showed that they had in fact, read, heard or seen accounts of the facts in this case and had, in fact, heard and discussed the facts of this case prior to trial; that some of the jurors who were actually selected and sworn as jurors in this case acknowedged having formed and expressed opinions as to this case; and that the failure of the Court in requiring whatever inquiry was to b. made, if any, in the presence of the other prospective jurors, was to require the

Defendant to suffer the contamination of the entire venire regarding what an individual juror may have read, heard or seen, what the prospective juror may have heard and generally discussed, regarding the facts of this case, prior to trial, and what opinions they may have formed or expressed, regarding the guilt or innocence of the Defendant, in order for the Defendant to have either intelligently challenged a particular juror for cause or to have intelligently exercised a peremptory challenge, as pertained to said individual juror based upon what he or she may have read, heard or seen or discussed regarding the facts of this case or based upon an opinion which he or she may have formed and/or expressed regarding the guilt or innocence of the Defendant.

7. That the Defendant was deprived of a fair and impartial trial by virtue of the provision of the Florida Statute excluding, at

the option of the individual prospective juror, any mother of a minor child or children, under the age of eighteen years, upon the basis that to exclude the same constituted a taking of a cross-section of individuals who were, in fact, contemporaries of the Defendant and, therefore, it constituted a discrimination against her, under the United States Constitution and the Constitution of Florida, based upon her sex and age, and based upon her need for a jury which constituted a cross-section of the people of Okeechobee County, Florida, and the community in which she lived covering all aspects of life and of the eligible jurors in the community; and that said Florida Statute is unconstitutional under the United States Constitution and the Constitution of Florida.

8. That the Court erred in limiting the interrogation of prospective jurors by counsel for the Defendant, by extensive questioning by the Court, itself, and, then, refusing to allow

counsel for the Defendant to interrogate said jurors as to the same areas of interrogation; that such limitation of such action by the Court were contrary to the Statutes of Florida, and that the Defendant was thereby denied due process of law under the United States Constitution and the Constitution of Florida.

9. That the Court deprived the Defendant of a fair and impartial jury and erred in restricting the questioning of the prospective jurors, in that it refused to allow individual jurors to be questioned out of the presence of the general venire and other prospective jurors, regarding what they may have read, heard or seen in news media relating to the facts of this case, regarding what they may have discussed regarding the facts of the case or had discussed with them, and regarding the opinions may have been expressed to them or by them regarding the guilt or innocence of the Defendant or regarding

any other opinions they may have formulated.

10. That the Court erred in disallowing certain questions that were asked of a number of jurors, to be asked of subsequent jurors, in the following particular areas: (1) lack of evidence, (2) requiring the evidence not only to be consistent with guilt but inconsistent with innocence, and (3) requiring the State to prove beyond and to the exclusion of a reasonable doubt that the homicide was not accidental.

11) That the Court erred in excusing for cause a juror or jurors under the provisions of Section 913.13, Florida Statutes upon the ground that he or she had beliefs or convictions which precluded him or her from finding the Defendant guilty of an offense punishable by death; and that said Statute is unconstitutional under the United States Constitution and the Constitution of Florida.

12. That the juror, Bertah L. Williams,

was guilty of misconduct in answering questions upon voir dire examination, as shown in a separate inquiry before the Court, and in denying any connection with law enforcement when, in fact, her daughter-in-law, Mrs. Glynda Williams, is employed in the Office of Sheriff John W. Collier, Okeechobee County, Florida, as a Deputy Sheriff; and the Court erred in failing therein to declare a mistrial.

13. That the evidence is insufficient to overcome the account of the tragedy by the Defendant that the Death of Charles M. McArthur was the result of an accident.

14. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not proved beyond a reasonable doubt.

15. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not inconsistent

with the innocence of the Defendant.

16. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were not of such a conclusive nature and tendency to remove a reasonable doubt of the innocence of the Defendant.

17. That the verdict, based entirely upon circumstantial evidence, was based upon circumstances which were susceptible of at least two reasonable constructions and the Defendant was not given the benefit of the construction indicating innocence.

18. That the evidence relied upon by the State failed to prove that the death of Charles M. McArthur was not caused by accident.

19. That the Court erred in failing and refusing to give the requested charge, No. XLV, of the Defendant as follows:

"Where circumstantial evidence is relied upon to convict a person

charged with crime, evidence must not only be consistent with Defendant's guilt but must also be inconsistent with any reasonable hypothesis of her innocence, and evidence which leaves nothing stronger than suspicion that Defendant committed the crime is not sufficient to sustain a conviction."

20. That the evidence relied upon by the State is insufficient to exclude every reasonable hypothesis that the death of Charles M. McArthur was accidental.

21. That the Court erred in refusing to permit the witness Suddreth to state his opinion as to the condition of the Defendant on the morning of the tragedy, whose appearance had been described by him and others as calm. (Tr. 852-854, 855).

22. That the Court erred in sustaining the State's objection to questions propounded

to the witness Sue Matthews as to the condition of the Defendant on the morning of the tragedy and in refusing to permit the witness to express her lay opinion in respect to Defendant's condition.

23. That the jury, having heard testimony of experts that the physical facts were consistent with unlawful homicide as well as with innocence, failed to appreciate and give the defendant the benefit of the rule of law presuming her innocent and requiring the jury in such circumstances to acquit the Defendant.

24. That the jury was confused and misled by the repeated statements by counsel for the State that Defendant gave several inconsistent accounts of how the tragedy occurred, evidently considering that because of the supposed inconsistency of her accounts, the jury was justified in disregarding her account and substituting such supposed inconsistency for proof by the State that Defendant fired the gun with intent to effect the death

of her husband, which required proof was completely lacking.

25. That the jury was confused and misled by the repeated statements by counsel for the State that Defendant gave several inconsistent accounts of how the tragedy occurred, although such supposed inconsistency resulted from the conflicting accounts of the three officers of the single interview with Defendant and not from any conflict in Defendant's account of how the tragedy occurred.

26. That the verdict of the jury is based on speculation, surmise and conjecture without any evidence from which a premeditated intent to effect the death of Charles M. McArthur could be inferred.

27. That from the evidence as a whole, reasonable men would be obliged to conclude that the handgun in question was defective and would fire not only by pull on the trigger but would also fire without touch of the trigger

when cocked, or by the hammer being pulled back and released before coming into a fully cocked position, therefore, the State's burden was to prove beyond a reasonable doubt that the gun was intentionally fired by the defendant, with respect to which there was complete absence of proof.

28. That the Court erred in denying the Defendant's Motion for a Judgment of Acquittal at the close of the case for the prosecution upon the Constitutional and other grounds argued by counsel for the Defendant thereon.

29. That the Court erred in denying the Defendant's Motion for a Judgment of Acquittal at the close of the taking of all of the evidence in the trial of the case upon the Constitution and other grounds argued by counsel for the Defendant thereon.

30. That the Court erred in following the proceedings to determine sentence under the provisions of Section 921.141, Florida Statutes, in that said Statute is unconsti-

tutional under the United States Constitution and the Constitution of Florida.

31. That the advisory sentence of the jury that the Defendant be sentenced to life imprisonment, under Section 775.082 (1), Florida Statutes, which would require the Defendant to serve no less than twenty-five (25) calendar years before becoming eligible for parole, unless the proceeding held to determine sentence according to the procedure set forth in Section 921.141, Florida Statutes, results in findings by the Court that the Defendant be punished by death, if unlawful, unconstitutional under both the United States Constitution and the Constitution of Florida; and that Section 775.082(1), Florida Statutes, is unconstitutional, under both the United States Constitution and the Constitution of Florida, in that it constitutes cruel and unusual punishment with a total disregard of all of the facts and circumstances surrounding the

conviction and totally ignores the statutory and Constitutional provisions for pardon, parole and probation.

32. That said Florida Statutes, Sections 921.141 and 775.082(1), violate the equal protection clause of both the United States Constitution and the Constitution of Florida as they pertain to this Defendant and other Defendants sentenced to life imprisonment, or purporting to be sentenced to life imprisonment, for the offense charged in the indictment and other offenses so punishable as they apply to the eligibility of this Defendant and other Defendants for parole and probation.

33. That the Defendant was convicted of the crime charged in the indictment, without due process of law; that for causes hereinabove set forth, not due to the Defendant's own fault, she was denied due process of law under both the United States Constitution

and the Constitution of Florida; and that for causes hereinabove set forth, not due to the Defendant's own fault, she did not receive a fair and impartial trial.

DATED on this 2nd day of May, 1975

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NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE
COUNTY, FLORIDA

STATE OF FLORIDA,	
-vs-	CASE NO. 73-74 CF
NADEAN O. McARTHUR	
Defendant.	

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

THIS CAUSE came on for hearing upon the Defendant's Motion for a New Trial. The motion contains 34 grounds, all of which have been considered by the court.

Grounds 2, 3, 13, 14, 15, 16, 17, 18, 20, 23, 26 and 27, all relate to an alleged insufficiency of the evidence in this case. The sufficiency of evidence has already been determined by the court in its order denying the Defendant's Post Verdict Motion for Judgment of Acquittal.

Ground 4 is based upon the allegation that the evidence failed to show any motive whatsoever on the part of the defendant to effect the death of her husband. This is not a legal basis for granting a new trial. As stated in Florida Standard Jury Instructions, Section 2.12(f), "If you find there is an absence of evidence suggesting a motive for the defendant to commit the crime charged, the absence of such motive is a circumstance which you should consider. However proof of motive is never necessary to a conviction." In this case there was competent evidence from which the jury could have found that the defendant would receive a substantial financial benefit as the result of her husband's death. This finding could have suggested to the jury a motive for the defendant to have committed the crime charged.

Ground 5 is based upon the contention that the court erred in denying the motion of the defendant for a change of venue. At the time her pre-trial motion for change of venue was denied, the court indicated that the denial was without prejudice and could be renewed by the defendant if it became apparent that it was not possible to select a fair and impartial jury in Okeechobee County. A jury, acceptable to both the defendant and the State, was selected during the first two days of the trial. The State utilized five of its challenges and the defendant used seven of her challenges. There remained a total of 97 prospective jurors in the venire who had not been called. Defendant's Motion for Change of Venue was not renewed prior to acceptance of the jury panel by the defendant and there has been no showing that the twelve jurors selected

were not fair and impartial. It cannot be inferred that the jury was not fair and impartial simply because a guilty verdict was returned. The information obtained from prospective jurors during voire dire examination, in the court's opinion, established that defense counsel had greatly overestimated and exaggerated the effect of pre-trial publicity on the minds of prospective jurors. There has been no showing that the court erred in denying Defendant's Motion for a Change of Venue.

Grounds 7 and 9 relates to the court's denial of the defendant's request to interrogate prospective jurors individually, in isolation, separate and apart from other prospective jurors. Individual questioning of prospective jurors out of the presence of the general venire is not required by the Rules of Criminal Procedure. Such a procedure has

not been recognized by any appellate decisions in the State of Florida and is contrary to the general practice through the State. Also, in this case it would not have been practical or feasible to have kept more than 100 members of the venire outside the courtroom while prospective jurors were questioned individually, one at a time, in the courtroom. In the court's opinion there was no abuse of discretion in denying defendant's request.

Ground 7 alleges that the defendant was deprived of a fair and impartial trial by virtue of the provision of Florida Statute 40.01(1), which provides "that expectant mothers and mothers with children under 18 years of age, upon their request, shall be exempted from Grand Jury and Petit Jury." There is no legal basis for this contention. The Florida Supreme Court in the case of

Hoyt v. State, 119 So. 2d. 691 (1960), pheld the constitutionality of the former Section 40.01(1), which provided in part "that the name of no female person shall be taken for jury service unless that person has registered with the Clerk of Circuit Court her desire to be placed on the jury list." The former Statute was more restrictive than the present Section 40.01(1) in that it required the affirmative act of registration by a woman before she could be called for jury service. Hoyt v. State, supra, was appealed the Supreme Court of the United States where the decision of the Florida Court was unanimously affirmed. Hoyt v. Florida, 368 U.S. 57, 7 L. Ed 2d. 118, 82 S.Ct. 159 (1961). Justice Harlan, speaking for the court, held that the Statute did not violate the 14th Amendment, either upon its face, since it was based on a reasonable classification, or as it

was applied, since it was not shown that Florida had arbitrarily undertaken to exclude women from jury service. The present Section 40.01(1) allows even more women on juries. All women are subject to being summonsed, and, only expectant mothers and mothers of children under 18, upon their request, are exempted. This exemption is certainly based upon a reasonable classification and the manner in which it is exercisable rests upon a rational foundation. A woman who attacks her conviction of crime on the ground that the State arbitrarily excluded women from jury service has the burden of proving her allegation. The present Section 40.01(1) is not unconstitutional on its face. Neither was it unconstitutionally applied in this case. It did not prevent the defendant from having a cross section of the people of Okeechobee County on her jury. The jury in fact consisted of

six white women and one black woman, four white men and one man of oriental descent. Several of the women on the jury were mothers of minor children.

Defendant's grounds 8 and 10 allege that the court erred in limiting the interrogation of prospective jurors by counsel for the defendant and by the court questioning prospective jurors itself. Rule 3.300(b) Rules of Criminal Procedure provides that after the prospective jurors are sworn: "The court shall then examine each prospective juror individually, except that, with the consent of both parties, it may examine the prospective jurors collectively. Counsel for both the state and defendant shall be permitted to propound pertinent questions to the prospective jurors after such examination by the Court." The voire dire examination of prospective jurors in this case was conducted in accordance with the Rules of Criminal

Procedure. It is the opinion of the Court that defendant's counsel were not unduly restricted in their questioning and were allowed to propound "pertinent questions" to the prospective jurors after examination by the court.

Ground 11 alleges that Section 913.13 Florida Statute is unconstitutional. Defendant does not name any specific potential juror who was eliminated from her trial by operation of this Statute. However, in any event, the Florida Supreme Court in the case of Baker v. State, 335 So. 3d 327 (1960) specifically upheld the constitutionality of this Statute. The Statute in question is in conformity with the holding of the United States Supreme Court in Witherspoon v. State of Illinois, 391 U.S. 510 88 S.Ct. 1770 30 L. Ed 2 776 (1969).

In ground 12 the defendant alleges that

the juror, Bertha L. Williams was guilty of misconduct in answering questions upon voire dire examination. The court held a separate evidentiary hearing on these allegations and has determined that there was no misconduct on the part of Bertha L. Williams which would have required the court to declare a mistrial or grant a new trial.

For ground 19 defendant asserts that the court erred in failing to give her requested Jury Instruction No. XLV on circumstantial evidence. The court instructed the jury on circumstantial evidence using Florida Standard Jury Instructions, Section 2.13. In the court's opinion, the Florida Standard Jury Instruction correctly and adequately instructed the jury on circumstantial evidence and that it was not necessary to give the additional instruction requested by the defendant.

In grounds 21 and 22, the defendant alleges that the court erred in refusing to permit the witnesses, Sudrath and Matthews,

to state their opinions as to the condition of the defendant on the moring of the shooting. Neither of these witnesses were qualified as experts to give their opinion as to the physical or mental condition of the defendant. Both witnesses were allowed to testify as to what they observed about the defendant and how she was acting.

In grounds 24 and 25 the defendant complains of statements by the State Attorney that the defendant gave inconsistent accounts of how the shooting occurred. There was competent evidence from which the jury could have found that the defendant did give inconsistent accounts of how the shooting occurred. The statements by the State Attorney were proper comments on the evidence and were not improper arguments to the jury.

In grounds 30 and 32 defendant contends that Section 921.41 Florida Statute is unconstitutional. There is no basis for

defendant's contention. The constitutionality of Section 921.41 has been upheld by the Florida Supreme Court in the case of State v. Dixon, 283 So. 2d. (1) (1973) and subsequent cases.

By grounds 31 and 32 defendant attacks the constitutionality of Section 775.082, Florida statute. This Statute would require defendant to serve no less than twenty-five calendar years before becoming eligible for parole if she were sentenced to life in prison rather than death. In the court's opinion, Section 775.082 is constitutional. The determination of maxium and minimum penalties to be imposed for violation of the law remains a matter for the Legislature.

Ground 34 alleges that the court erred in denying the Defendant's Motion to Sequester the Jury. Rule 3.370, Rules of Criminal Procedure, provides that "after the jurors have

been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered." The court made its decision not to sequester the jury after the voire dire examination was completed. After listening to the answers given by the prospective jurors during the two days of jury selection, it was apparent to the court that defense counsel had greatly overestimated and exaggerated the impact and effect of pre-trial publicity on the prospective jurors. It was the court's opinion at that time that it would not be necessary to sequester the jury and to have done so would have imposed an unnecessary personal hardship on the jurors. The members of the jury were kept together during the day and through the lunch hour. Before being allowed to separate in the evening they were carefully and repeatedly instructed and cautioned by the court. There has been no showing, and the court has no reason to believe, that the members of the jury did not strictly comply with the court's instructions.

There has been no showing that the jury's verdict was in any way effected by the court's decision not to sequester the jury. The court remains of the opinion that it was not necessary to sequester the jury in this case, and that to do so would have imposed an undue personal hardship on the jurors.

Grounds 28 and 29 allege error in the court's denial of Defendant's Motions for Judgment of Acquittal made during the trial. These matters have already been cosidered and disposed of in the court's order denying Defendant's Post Verdict Motion for Judgment of Acquittal. The remaining grounds, 1 and 33, are simply general statements that the verdict is contrary to the law and that the defendant did not receive a fair and impartial trial. After a review of the evidence and the applicable law, it is the court's opinion that

the verdict is not contrary to the law and that the defendant did receive a fair and impartial trial. It is therefore

ORDERED AND ADJUDGED that Defendant's Motion for New Trial be and the same is hereby denied.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 9th day of May, 1975.

(s) James E. Alderman
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Chester Bedell, Esquire, 1500 Barnett Bank Building, Jacksonville, Florida 32202, and to Raymond E. Ford, Esquire, Post Office Box 3307, Arcade Building, 121 North Fourth Street, Fort Pierce, Florida 33450, this _____ day of May, 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1473

NADEAN O. McARTHUR,
Petitioner.

versus

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
in and for Okeechobee County,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE
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THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
in and for Okeechobee County,
Respondent.

PETITIONER'S REPLY BRIEF

In his brief, respondent places considerable emphasis upon Rule 6.16(b), Florida Rules of Appellate Procedure (1962 Revision), which at the time of petitioner's appeal of her conviction, provided:

> "Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by

> a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Respondent contends that this Florida rule of court gives Florida appellate courts "broad discretion . . . to fashion remedies appropriate to the circumstances of each case in the 'interests of justice' " (Respondent's Brief at 13-14), and that somehow this "broad discretion" provides justification for retrial of petitioner, the double jeopardy clause notwithstanding. Respondent further suggests that Rule 6.16(b) gives the appellate courts of Florida the right to order a new trial when, though the evidence may be legally and technically sufficient to support the jury's verdict, the court concludes that the *weight* of the evidence does not support the conviction, citing *Tibbs* v. *State*, 337 So.2d 788 (Fla. 1976) (Respondent's Brief at 14-15).

The fact that the Florida Supreme Court may have attempted to give itself and the lower Florida appellate courts the power "to fashion remedies appropriate to the circumstances of each case in the 'interests of justice' " is obviously irrelevant and ineffectual to the extent that it conflicts with the double jeopardy clause's prohibition of placing an individual twice in jeopardy for the same offense. Moreover, respondent's attempt to suggest that the Supreme Court of Florida might have reversed petitioner's conviction, not because the evidence was legally insufficient to establish her guilt, but rather because that court concluded that the weight of the evidence

presented by the State left a question concerning petitioner's guilt, is untenable in light of the language used by the Supreme Court of Florida in its opinion reversing petitioner's conviction.* On the contrary, it is apparent that the Florida Supreme Court based its reversal of petitioner's conviction on the conclusion that the evidence presented was legally insufficient to justify that conviction. In addition, since petitioner was not sentenced to death, it is not readily apparent how the second sentence of Rule 6.16(b) would have had any application to petitioner's appeal of her conviction.

Respondent next argues that the Florida Supreme Court reversed petitioner's conviction and ordered a new trial based on grounds asserted by petitioner in a motion for new trial filed in the trial court (Respondent's Brief at 18-19). The conclusion which respondent wishes the Court to draw from this contention is that petitioner, by challenging the sufficiency of the evidence in a motion for new trial, waived her right to rely upon the double jeopardy clause. This contention, however, is unsupported by the facts.

In the first place, petitioner did not ask the Florida Supreme Court to grant her a new trial because the evidence presented had been legally insufficient to justify her conviction. Rather, her briefs uniformly re-

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* The Florida Supreme Court's opinion included the following statements: "the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death" (351 So.2d at 978; A. 14); "appellant's innocence has not been disproved" (351 So.2d at 978; A. 15); and "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). (A. ___ refers to the appendix to the petition for writ of certiorari filed herein.)

quested reversal with directions that she be discharged because of the trial court's erroneous refusal to grant her repeated motion for judgment of acquittal. Furthermore, the Court's attention should be directed to the fact that, prior to the decision of the Supreme Court of Florida in *Mancini* v. *State*, 273 So.2d 371 (Fla. 1973), a defendant was required to challenge the legal sufficiency of the evidence by filing a motion for new trial in the trial court before an appeal could be taken challenging the legal sufficiency of the evidence. *See, e.g., State* v. *Owens*, 233 So.2d 389 (Fla. 1970). The *Mancini* decision has created considerable confusion concerning what must be done to preserve one's right to challenge the sufficiency of the evidence on appeal, since, while *Mancini* held that it was no longer necessary to file a motion for new trial in order to challenge on appeal *the legal sufficiency of the evidence* presented by the State, assuming that a motion for judgment of acquittal was properly made, *Mancini* also held that it *was* necessary to file a motion for new trial before one could argue on appeal that the *weight of the evidence* in a jury trial did not support the jury's verdict. *See Everett* v. *State*, 339 So.2d 704 (Fla.3d DCA 1976); *Castillo* v. *State*, 308 So.2d 619 (Fla.3d DCA 1975). *See generally* 1 C. Wright, Federal Practice and Procedure (Criminal) § 553 (1969 ed.). It was because of the confusion engendered by the *Mancini* case, and because counsel for petitioner sought to protect her right to challenge the *weight* of the evidence on appeal, that those portions of the motion for new trial relating to the sufficiency of the evidence cited by respondent were so included. Dealing with a similar contention that a motion for new trial including a challenge to the sufficiency of the evidence constituted a waiver of the defendant's right to rely on the double jeopardy clause, the United States Court of Appeals for the District of Columbia Circuit, in *United States* v. *Wiley*, 517 F.2d 1212 (D.C.Cir. 1975), said:

> "[A] waiver should not result even where the defendant's sole ground for appeal is the insufficiency of the evidence and a new trial motion is deliberately made. By adding the new trial motion the defendant is plainly not asking for a retrial where the court considers the lack of evidence to require the grant of his motion for judgment of acquittal. Rather, he is seeking to obtain a new trial when the court considers the evidence to be marginally sufficient but determines that the state of the evidence calls for a new trial in the interest of justice." *Id.* at 1217 n.24.

Thus, whatever may be said about petitioner's having filed a motion for new trial, that act certainly did not constitute the type of "voluntary knowing relinquishment of a right" which this Court has repeatedly found to be necessary before it would conclude that a constitutional right had been waived. *See, e.g., Green* v. *United States*, 355 U.S. 184, 191 (1957). By including grounds directed to the weight of the evidence in the motion for new trial, counsel for petitioner were merely attempting to preserve petitioner's right to raise that claim in the appellate court. In this regard, the observations made by the court in *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653 (Ct.App.1968), are particularly appropriate. There, the court said:

"We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative." 241 N.E.2d at 662.

Finally, respondent argues that "[t]he spectre of endless retrials envisioned by Petitioner . . . if her arguments are not accepted by this Court, is an illusion," in that "defendants such as Petitioner are protected against the possibility of such vexatious litigation" because "[t]he appellate courts of Florida retain the authority to discharge a defendant completely if the evidence is insufficient and the interests of justice would be served by a discharge." (Respondent's Brief at 19-20.) Assuming, for purposes of argument, that the appellate courts of Florida do retain such authority, why was it not exercised in this case? Respondent fails to identify how the "interests of justice" are served by allowing the State to try petitioner again, instead of directing her discharge. Likewise, in the Florida Supreme Court's opinion

reversing petitioner's conviction because the evidence was legally insufficient to justify the conviction, no mention is made of any factors supporting a conclusion that the "interests of justice" require ordering a new trial, rather than directing that petitioner be discharged.

Petitioner repeatedly moved for a judgment of acquittal in the trial court, contending that the evidence was legally insufficient to support a conviction of the offense with which she was charged, or any other offense. Each time, her motion was denied. Had the trial judge granted her motion, the double jeopardy clause would have prohibited a subsequent trial for the same offense. *See United States* v. *Martin Linen Supply Company*, 430 U.S. 564 (1977); *Fong Foo* v. *United States*, 369 U.S. 141 (1962). The Florida Supreme Court reversed petitioner's conviction because the evidence was legally insufficient to support the conviction, the ground unsuccessfully urged upon the trial judge three successive times in support of petitioner's motion for judgment of acquittal. "Justice" requires that petitioner be protected against being tried a second time on the same charge. Only this Court can assure such a result.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, this Court should issue a writ of certiorari to review the order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition.

Respectfully submitted,

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